

*In the Matter of Joseph W. Scott,*  
*Essex County Department of Corrections*  
DOP Docket No. 2006-2293  
**(Merit System Board, decided July 19, 2006)**

Joseph W. Scott, a County Correction Officer with Essex County (County), represented by Ciro A. Spina, III, Esq., petitions the Merit System Board (Board) for interim relief of his immediate suspension on or about November 5, 2005.

By way of background, the petitioner presented that on or about November 5, 2005, he reported for his regular tour of duty and was ordered by a superior officer to leave the facility and turn in his equipment. By letter dated November 10, 2005, counsel for the petitioner requested from the appointing authority a copy of the charges and documentation pertaining to petitioner's immediate suspension without pay. As of December 14, 2005, the petitioner asserted that the County had failed to provide him with a Preliminary Notice of Disciplinary Action (PNDA). Subsequently, the appointing authority issued a PNDA to the appellant, via certified mail, dated January 3, 2006 (postmarked January 4, 2006) charging him with being absent for more than five consecutive days without notice, chronic or excessive absenteeism, neglect of duty, and conduct unbecoming a public employee. In the PNDA, the County specified that "Joseph Scott has been absent from duty in excess of 30 days." It also noted that "such behavior has an adverse impact to the institution's ability to function effectively in the managing of the inmate population. His termination is, thus, necessary to maintain the safe, healthy, orderly and effective direction of essential public services." The PNDA does not specify the first day on which the petitioner was absent from duty.

The petitioner originally requested that the Board immediately reinstate him and provide him with back pay, benefits, seniority, and counsel fees for the County's failure to serve him with a PNDA until 59 days after his suspension without pay effective November 5, 2005. Further, the petitioner presented that he was denied his due process rights since the appointing authority failed to provide him with the charges against him in a timely fashion and provide him with an opportunity to review this evidence to give him an opportunity to respond. Moreover, the appellant stated that the appointing authority failed to provide him with a hearing within 30 days. Thus, in a January 12, 2006 submission, the petitioner waived his right to a hearing by the appointing authority pursuant to *N.J.S.A. 40A:14-147* and appealed directly to the Board. The petitioner provided a copy of a Major Disciplinary Appeal Form to the Board.

In a submission filed on April 5, 2006, the petitioner presents that on March 7, 2006, his counsel was faxed a "Notice of Disciplinary Action" from the County dated March 3, 2006. This notice indicated that a hearing was scheduled for March 23, 2006 at 11:30 a.m. Subsequently, on March 21, 2006, counsel received discovery from the County dated March 17, 2006 confirming the hearing date and indicating that three witnesses may be called. The petitioner states that the hearing was conducted on March 23, 2006 by Anthony C. Mack, Esq., who upheld his termination. The petitioner submits a copy of Mr. Mack's letter of March 29, 2006 to the County, but it does not specify the hearing officer's recommendations. On April 7, 2006, the appointing authority issued a Final Notice of Disciplinary Action (FNDA) removing the appellant effective April 7, 2006. The FNDA indicated that the appointing authority attempted to serve the appellant notice via certified mail and that the post office attempted to deliver the notice, but that the addressee was not known and it was unable to forward the mail. As indicated earlier, the appellant has appealed to the Board and a hearing has been granted.

Although provided the opportunity to do so on two occasions by letter (dated December 21, 2005 and January 24, 2006), the County has not provided any information regarding this matter for the Board's review.

A review of the appellant's personnel record maintained by the Department of Personnel (DOP) reflects that the appellant was suspended without pay on November 4, 2005 and that he was removed effective April 7, 2006. A Disciplinary Action Form was submitted by the appointing authority to reflect the start of his suspension.

## **CONCLUSION**

It must be emphasized that the role of the Board at this stage of these proceedings is not to adjudicate the merits of the charges, which it recognizes are serious, and, if proven, would warrant major discipline. Rather, the sole issue before the Board at this juncture is whether the County presented a valid basis to immediately suspend the petitioner pursuant to *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5*. *N.J.S.A. 11A:2-13* and *N.J.A.C. 4A:2-2.5(a)1* provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. However, a PNDA with an opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension. *N.J.A.C.*

4A:2-2.5(d) provides that if a departmental hearing has been requested, it shall be held within 30 days of the PNDA unless waived by the employee or a later date is agreed to by the parties. *N.J.A.C.* 4A:2-2.5(e) provides that appeals concerning violations of this section may be presented to the Commissioner through a petition for interim relief.

Regarding the petitioner's immediate suspension, the PNDA issued by the appointing authority was expressly based on its determination that such a suspension was "necessary to maintain the safe, healthy, orderly and effective direction of essential public services" and that his absences had "an adverse impact to the institution's ability to function effectively in the managing of the inmate population." In reviewing this matter, it is not necessary to address the merits of the charges against the petitioner. Rather, the issue is whether the nature and seriousness of the charges support the necessity for an immediate suspension. Clearly, the disciplinary charges at issue are extremely serious. In the instant matter, the petitioner's position charged him with maintaining the safety and security of the prison and the inmates within. The petitioner is alleged to have neglected one of his most basic duties as he had not reported for work in excess of 30 days. An individual employed in a custodial position in a correctional facility can surely be deemed a hazard to other officers and inmates when he does not report for duty which could compromise the safety of an inherently dangerous facility. Indeed, the danger posed by a correctional facility being short staffed and management being unsure as to when and if its custodial staff will report for duty could have dire consequences. In addition, the appellant's suspension has been shown to be necessary to maintain the safety, order, and effective direction of public services. Moreover, the Board is mindful that the petitioner, as a law enforcement officer, is held to a higher standard than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). Thus, based on the nature of the charges against the petitioner, the Board finds that the appointing authority possessed a valid basis for imposing an immediate suspension, pending the petitioner's department hearing on the merits of the charges.

Regarding petitioner's request to waive a hearing with the appointing authority through the provisions of *N.J.S.A.* 40A:14-147, initially, this issue now appears to be moot, as apparently a hearing was conducted on March 23, 2006 by the County. Nevertheless, the unambiguous language of *N.J.S.A.* 40A:14-147 is directed to permanent members of officers of the police department or force. Thus, since the petitioner is a County Correction Officer, the provisions of *N.J.S.A.* 40A:14-147 do not apply.

However, several procedural violations cannot be ignored. Based on the petitioner's un rebutted submissions and a review of DOP records, it appears that he was suspended without pay on November 4, 2005. On November 10, 2005, the petitioner requested documentation from the Director of the Essex County Department of Corrections as well as the County's counsel regarding the specifics of his suspension. The County failed to respond to his request or the requests for information from the Board. Clearly, in issuing a PNDA 59 days after he was allegedly requested to leave the facility, the County did not serve him with the PNDA within five days of his immediate suspension. Moreover, it is evident that the petitioner diligently attempted to obtain information regarding his suspension from the County in order to resolve the matter through the hearing process. However, he was not provided with any information regarding his suspension until the PNDA was issued on January 3, 2006, after two attempts by the petitioner to receive information on this matter and one from the Board. The PNDA issued was vague and is not clear as to when the petitioner was absent from work without authorization.

On January 12, 2006, the petitioner asserted his right to waive the hearing by the appointing authority, and appealed directly to the Board. The petitioner has not presented any information that he rescinded his request to waive the departmental hearing and the matter has been transferred to the Office of Administrative Law for a hearing.

Despite repeated requests, the County has not provided any information regarding this matter for the Board to review. Thus, absent any other information, the petitioner has demonstrated that the appointing authority violated *N.J.A.C. 4A:2-2.5(a)1*, when it failed to serve him with a PNDA advising him of his immediate suspension within five days of imposition of that suspension. Moreover, the record reflects that the appointing authority did not comply with the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *N.J.A.C. 4A:2-2.5(b)*, as there is also nothing in the record to demonstrate that the petitioner was provided with any type of pre-termination hearing. While such procedural deficiencies do not warrant dismissal of the charges, it is appropriate to institute a remedy for the appointing authority's failure to serve the PNDA within the prescribed time frames or to provide him with a pre-termination hearing. See e.g., *In the Matter of Kenneth F. Hixenbaugh* (MSB, decided February 24, 1998).

Pursuant to *N.J.A.C. 4A:2-2.5(d)*, a departmental hearing, if requested, shall be held within 30 days of the PNDA unless waived by the employee or at a later date as agreed to by the parties. An appointing authority's unilateral delay in holding a departmental hearing does not warrant a

dismissal of the charges. *See Goodman v. Department of Corrections*, 367 N.J. Super. 591 (App. Div. 2004). However, the petitioner is entitled to some form of relief for such a delay. *See In the Matter of Patrick Dunican*, Docket No. A-5937-99T1 (App. Div. November 9, 1999); *In the Matter of Edward Wise* (MSB, decided July 19, 1999); *In the Matter of Kenneth Hixenbaugh*, *supra*. In this case, the petitioner waived his right to a departmental hearing on January 12, 2006 and appealed directly to the Board. Thus, the Board finds that the petitioner is entitled to an award of back pay from the date he was immediately suspended to the date he waived his departmental hearing.

With regard to counsel fees, N.J.A.C. 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. While the Board has awarded reasonable counsel fees in the past where employees have successfully challenged the imposition of immediate suspensions, the instant matter is distinguishable. *See e.g., In the Matter of Debora U. Brown* (MSB, decided June 9, 2004) (Board awarded reasonable counsel fees where the appointing authority did not possess a valid basis to impose an immediate suspension); *In the Matter of Andrew Kullen* (MSB, decided September 26, 2000) (Back pay, benefits and counsel fees granted where the appointing authority did not have a sufficient basis for an immediate suspension). In this case, the Board has determined that the petitioner is entitled to limited back pay, based on procedural deficiencies related to his immediate suspension. However, the Board has also concluded that the appointing authority possessed a valid basis to impose an immediate suspension, based on the nature of the charges against him. Thus, the petitioner has not prevailed on substantially all of the primary issues in the instant matter and is not entitled to an award of counsel fees in the instant matter.

## **ORDER**

Therefore, it is ordered that the petitioner be awarded back pay for the period from November 4, 2005 through January 12, 2006, but the petitioner's request for counsel fees be denied.